

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Qwest's Section 271)	
Application for Colorado, Idaho, Iowa,)	WC Docket No. 02-148
Nebraska, and North Dakota)	
_____)	

**Comments of the
Washington Utilities and Transportation Commission
August 28, 2002**

The Washington Utilities and Transportation Commission (WUTC) offers these comments in response to the Federal Communications Commission's (Commission or FCC) request for comments in connection with Qwest's Section 271 application for Colorado, Idaho, Iowa, Nebraska, and North Dakota. The WUTC offers comments in this proceeding, even though it does not involve the Washington State application, because it believes that any concerns would apply generally to Qwest's applications in other states.

The WUTC believes that the primary issue with Qwest's unfiled agreements is one of enforcement: Has Qwest (and perhaps each CLEC party one of the agreements) violated Sec. 252 by failing to file an interconnection agreement? In the Washington State proceeding, AT&T and Public Counsel argued that the WUTC should withhold its decision on the Sec. 271 application while it investigated the compliance issue, on the theory that it would not be in the public interest to allow long-distance re-entry by a company that engaged in the practice of entering into such unfiled agreements. The WUTC rejected this argument in its 39th *Supplemental Order*, noting that no party had actually filed a complaint in Washington regarding the agreements.¹ The allegations were not only unproved but also not even formally alleged.

¹ The WUTC held hearings in May 2002 addressing the public interest requirement. During the hearings, AT&T and Public Counsel filed additional testimony and comments, to which Qwest responded. The WUTC also heard testimony from AT&T and Qwest witnesses. AT&T, Public Counsel, Sprint, ASCENT, Covad, WorldCom, and Qwest filed post-hearing briefs on the public interest issue on June 7, 2002. The WUTC issued Bench Request No. 46 in March 2002, and since April 2002, Qwest has filed numerous agreements between itself and various CLECs in response. In its 39th *Supplemental Order* (paras. 289-295) the WUTC decided against deferring its decision on Qwest's application for market re-entry pending investigation into the agreements. The WUTC affirmed this decision in its 40th *Supplemental Order*, in which it denied a petition by Covad and AT&T for reconsideration of the 39th *Supplemental Order*.

While the same essential question of public interest is now before the FCC, the circumstances are different than those faced by the WUTC, in that a formal proceeding on the agreements themselves is pending. Qwest has asked the FCC in WC Docket No. 02-89 to issue a declaratory ruling on the question of whether Sec. 252 requires it to file these agreements. The WUTC believes that this proceeding, along with any enforcement action that might result, is the appropriate forum for consideration of these agreements, and it encourages the FCC to provide guidance to Qwest, the CLECs, and state commissions. In the meantime, the WUTC will review those interconnection agreements that Qwest filed for approval, as Qwest described in its August 20, 2002, letter to the FCC.

A secondary area of concern regarding the unfiled agreements is whether they resulted in any distortion of the OSS performance results. The argument, as the WUTC understands it, is that these agreements may have resulted in better service to the participating CLECs. This better service, unless offset by worse service to the non-participating CLECs, would produce higher overall OSS performance results for the CLECs as a group and thereby distort the reported results. In the Washington State proceeding, no party provided evidence of this effect, and the WUTC concluded that Qwest's performance overall was at a level that afforded its competitors a meaningful opportunity to compete. The FCC may wish to review this issue further if it has received additional evidence of agreements that may have resulted in material distortions of Qwest's performance results.

In general, it is reasonable to expect that Qwest would work extra hard on performance issues during the OSS test, just as a student crams the night before the big test. Qwest may have worked extra hard by improving its overall service levels to CLECs, by addressing certain sore points of individual CLECs, or both. The FCC has anticipated such behavior in requiring not just a successful OSS test but also an ongoing performance assurance plan. The performance plan should be comprehensive to check the possibility of selective performance on individual measures or for individual CLECs, and the issues raised by these agreements demonstrates the importance of ongoing performance review. However, if there is any merit to the theory that the participating CLECs got better service during the test, it is worth noting that once these agreement provisions are made available to other CLECs, as proposed by Qwest, the result would be improved performance to CLECs overall.

In conclusion, the WUTC believes that the unfiled agreements should, in general, be dealt with separately from any Sec. 271 application. The FCC should provide guidance on whether federal law requires the filing and approval of these agreements, and state commissions should review and enforce those agreements that Qwest has since filed for state commission approval. The WUTC found no evidence that the agreements should be cause to deny or delay Qwest's Sec. 271 application, but the FCC should consider any additional evidence that it may receive on this point. In any case, the episode illustrates the need for a comprehensive performance assurance plan and continuing regulatory oversight after any Sec. 271 application is granted.